No. 76-1309

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 545 F. 2d 1182. The opinion of the district court (Pet. App. 15a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1976, and a petition for rehearing was denied on January 20, 1977 (Pet. App. 13a-14a).

On February 10, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 21, 1977. The petition was filed on that date and was granted on June 5, 1978 (A. 80). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is proper for a court to suppress otherwise admissible and probative evidence in a criminal case solely because the government failed to comply fully with an internal regulation that imposes procedures not required by the Constitution or by statute.

STATUTORY AND OTHER PROVISIONS INVOLVED

1. 18 U.S.C. 3501 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. * * *
>
> * * * * *
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

2. Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

3. The Attorney General's October 16, 1972, Memorandum to the Heads of Executive Departments and Agencies, "Monitoring Private Conversations with the Consent of a Party," is reproduced in the Appendix, *infra.*

4. Paragraph 652.1 of the Internal Revenue Service Manual (in effect January 1975) provides in pertinent part:

> Authority
>
> (1) The procedures established concerning the interception, overhearing, transmitting or recording of telephone or non-telephone conversations, with the consent of one or all of the parties, are set forth herein in accordance with IRS policy statement P-9-35; and in accordance with the Department of Justice Guidelines on "Monitoring Private Conversations With the Consent of a Party," dated October 16, 1972.
>
> * * * * *
>
> (3) The highest level of integrity and ethics will be observed in the granting of approval for the use, and in actual use, of any technical investigative equipment. The Service policy to fully respect and observe the Constitutional and other rights of all persons and to prohibit the improper use of surreptitious listening devices will be strictly enforced. *Any employee who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disci-*

plinary action and may be removed from the Service [emphasis in original].

Paragraph 652.22 of the Internal Revenue Service Manual (in effect January 1975) provides in pertinent part:

> (1) The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. If the Director, Internal Security Division, cannot be reached, the Assistant Commissioner (Inspection) may grant emergency approval. This authority cannot be redelegated.
>
> (2) Written approval of the Attorney General must be requested 48 hours prior to the use of mechanical, electronic or other devices to overhear, transmit or record a non-telephone private conversation with the permission of one party to the conversation. * * * Any requests being telefaxed into the National Office should be submitted four days prior to the anticipated equipment use.
>
> (3) [A request] must be signed and submitted by the Regional Inspector or Chief, Investigations Branch, to the Director, Internal Security Division. Such requests will contain [reason for such proposed use; type of equipment to be used; names of person involved; proposed location of equipment; duration of proposed use (limited to 30 days from proposed beginning date); and manner or method of installation] * * *.
>
> * * * * *
>
> (6) When emergency situations occur, the Director, or Acting Director, Internal Security Division, or the Assistant Commissioner (Inspection) will be contacted to grant emergency approval to monitor. This emergency approval authority cannot be redelgated. * * * Emergency authorizations pursuant to this exception will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General.
>
> (7) If, at the time the emergency approval request is submitted, it is desired that approval for use of electronic equipment be given for an extended period, this should be indicated on the [appropriate form]. The Director, in addition to reporting his authorization for emergency use to the Attorney General, will also request approval for the Use of Electronic Equipment for the duration of that period specified by the requestor.

STATEMENT

1. In March 1974, during an audit by the Internal Revenue Service ("IRS") of respondent's individual and employment tax returns, respondent proposed a "personal settlement" with Internal Revenue Agent Robert K. Yee (A. 12, 20, 25-26, 46). Agent Yee immediately reported this offer to the Internal Security Division of the IRS (A. 20, 23). During the next several months, Agent Yee confined his investi-

gation to conversations with respondent's wife, who kept the books for his dental practice, and with respondent's accountant (A. 21-22). The agent again contacted respondent on January 27, 1975, at which time respondent renewed the bribe offer. Instead of the approximately $3,200 that respondent estimated he owed in taxes, he proposed paying $1,000 to the government, giving $1,000 to Agent Yee, and keeping the balance for his accountant or himself (A. 34, 66).

At the direction of Inspector William A. Hill of the Internal Security Division, Agent Yee telephoned respondent on January 30, 1975, and arranged a meeting for the next day at respondent's office (A. 14-15). During this meeting, respondent gave Agent Yee $500 in partial payment for settling the tax investigation as respondent had suggested (A. 34, 69). Unbeknownst to respondent, the conversation was monitored by Inspector Hill and recorded by Agent Yee by means of a tape recorder and electronic transmitting device concealed on the agent's person (Pet. App. 2a-3a; A. 14, 34, 69).

Agent Yee telephoned respondent on February 5, 1975, again at Inspector Hill's direction, and scheduled a meeting for the following afternoon to show respondent an agreement form containing the agent's proposed calculations of respondent's tax liability (A. 16, 30, 59). That meeting—at which respondent offered Agent Yee an additional $2,000 to audit his 1973 and 1974 individual income tax returns to respondent's satisfaction (A. 37, 71)—was also monitored and recorded by the agent without respondent's knowledge (Pet. App. 3a-4a).

A third meeting took place on February 11, 1975. It, too, was secretly monitored and recorded by the agent, acting with Inspector Hill's assistance. At this meeting respondent gave Agent Yee $500 as the second installment for the favorable termination of the audit (Pet. App. 4a; A. 39, 74).

On February 26, 1975, respondent was indicted in the United States District Court for the Northern District of California on three counts of bribing a federal official, in violation of 18 U.S.C. 201(b) (Pet. App. 1a; A. 3-4).

2. Prior to trial,[1] respondent moved to suppress the recordings of his meetings with Agent Yee[2] on the

[1] Respondent's first trial ended in a mistrial when the jury was unable to reach a verdict. The motion to suppress was filed before the second trial began. On July 19, 1978, respondent was indicted on charges of obstruction of justice and subornation of perjury (18 U.S.C. 1503 and 1622) in connection with his first trial.

[2] The telephone conversation between Agent Yee and respondent on January 30, 1975, as well as telephone conversations on January 28 and 29 and February 5 and 13, 1975, were electronically monitored and recorded with Agent Yee's consent. The IRS regulations provide that either the Assistant Regional Inspector (Internal Security) or the Chief of the National Office Investigations Branch (Internal Security) must give advance approval, orally or in writing, to consensual monitoring of telephone conversations. Internal Revenue Service Manual ¶ 652.21(1)-(5). The district court found (Pet. App. 17a) that the recordings of respondent's telephone calls with Agent Yee were made in substantial compliance with these regulations and accordingly denied respondent's motion to suppress them. The admissibility of these recordings is not at issue here.

ground that they had not been properly authorized under applicable IRS internal regulations governing consensual monitoring of face-to-face conversations between agents and taxpayers. Those regulations require that, except in "exigent circumstances," advance authorization for such monitoring be obtained by designated IRS officials from the Department of Justice (IRS Manual ¶ 652.22(1)). "Exigent circumstances" are not defined, but the regulations provide that emergency authorization within the IRS alone "will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General" (IRS Manual ¶ 652.22(6)).

On either January 30 or 31, 1975, shortly after the January 31 meeting in respondent's office had been arranged, Inspector Hill had applied in writing for authorization to monitor conversations between respondent and Agent Yee for a period of 30 days, beginning January 31, 1975 (A. 34, 36, 63-67). This request was transmitted to the IRS National Office in Washington, D.C., on January 31, 1975 (A. 34, 37, 68), but it apparently was not forwarded to the Department of Justice for final approval until February 7, 1975 (A. 39-40, 78). As a result of this delay, the monitoring of the January 31 meeting was given "emergency approval," pursuant to ¶ 652.22(6), by the Director of the IRS Internal Security Division (A. 34, 41, 68). Moreover, since Inspector Hill's request for authorization to monitor had not been acted upon by the time of the February 6 meeting, approval to record that meeting was again given on an emergency basis by the Director of the Internal Security Division (A. 34, 37, 42, 70-72). The monitoring of the February 11, 1975, meeting, however, was authorized by the Justice Department as well as by the appropriate IRS personnel (A. 39-40, 42, 73-75, 77-79).

3. The district court suppressed all three recordings (Pet. App. C). It reasoned that since Agent Yee alone had been responsible for selecting the date of the first two meetings with respondent, no *bona fide* emergency existed to justify the failure to get advance approval from the Department of Justice for the monitoring of those meetings (*id.* at 19a-20a). The district court also found (*id.* at 18a) that the February 11 monitoring violated the IRS regulations because it had been authorized by a Deputy Assistant Attorney General rather than by the Attorney General or an Assistant Attorney General.

The court of appeals reversed that part of the district court's order suppressing the February 11 recording, holding that the authorization by a Deputy Assistant Attorney General was not inconsistent with the IRS regulations (Pet. App. 4a-8a). It agreed with the district court, however, that the "emergencies" of January 31 and February 6 had been government-created and hence did not excuse the IRS's failure to follow its "self-imposed requirement of obtaining advance authorization from the Justice Department" (*id.* at 8a). It therefore affirmed the suppression of the recordings made of those meetings (*id.* at 8a-9a).

In reaching this result, the court acknowledged (Pet. App. 10a; citation and footnote omitted) that "[d]uring 'a period of increasing disenchantment with the exclusionary rule,' * * * the suppression of evidence because of non-compliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach." Nevertheless, it felt bound—"[a]bsent a contrary ruling by the Supreme Court or by this court en banc"—by the decision of another panel of the Ninth Circuit in *United States* v. *Sourapas*, 515 F. 2d 295, suppressing evidence obtained by an IRS agent who had questioned a potential criminal defendant without first giving *Miranda*-type warnings, as required by IRS regulations even for non-custodial interrogation. Moreover, although the court below conceded that not every agency failure to adhere to its internal procedures would amount to a deprivation of due process, it concluded that the noncompliance here "harmed more than just the 'efficiency of the I.R.S. operations' " (*id.* at 11a) and that suppression was therefore warranted.

SUMMARY OF ARGUMENT

Agent Yee consented to the recording of his conversations with respondent on January 31 and February 6, 1975, and the monitoring therefore did not violate the Fourth Amendment or any federal statute. The court of appeals suppressed the recordings solely because the Internal Revenue Service had failed to comply fully with its internal operating procedures

requiring approval from specified officials in the Department of Justice in advance of consensual electronic surveillance of face-to-face discussions between agents and taxpayers. A violation of agency regulations such as these, however, does not justify the suppression of otherwise admissible and probative evidence in a criminal case.

I. The failure of Agent Yee and Inspector Hill to follow the procedures outlined in the IRS Manual did not deprive respondent of due process, which has been defined to encompass the "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U.S. 103, 112, and that reflect "the community's sense of fair play and decency." *Rochin* v. *California*, 342 U.S. 165, 173. Contrary to the court of appeals' apparent assumption, the Due Process Clause does not require immaculate agency adherence to its own regulations. The cases most often cited for the contrary proposition, *Accardi* v. *Shaughnessy*, 347 U.S. 260, and *Service* v. *Dulles*, 354 U.S. 363, merely "enunciate principles of federal administrative law rather than of constitutional law * * *." *Board of Curators* v. *Horowitz*, No. 76-695, decided March 1, 1978, slip op. 14 n. 8.

Hence, any conclusion that the conduct of the IRS agents—which occurred in an investigative rather than an administrative setting—violated respondent's due process rights must be based on more than their failure to satisfy the IRS rules. There must also be a showing that their oversight operated to treat re-

spondent unfairly, for "[t]he limitations of the Due Process Clause * * * come into play only when the Government activity in question violates some protected right of the *defendant*." *Hampton* v. *United States*, 425 U.S. 484, 490 (plurality opinion; emphasis in original).

A. There is no conceivable basis in the present case on which to predicate a violation of respondent's due process rights. There is no evidence that the regulations at issue here, particularly IRS Manual ¶ 652.22, were intended to grant citizens protection against consensual electronic eavesdropping beyond those already provided by the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, much less to allow those additional protections to be enforceable in court over the agency's objection. To the contrary, the procedures were designed primarily to permit responsible government officials to control the actions of their subordinates in an area of some sensitivity, so that out of the broad class of investigations in which conversations between suspects and agents might be recorded without constitutional or statutory restraints, electronic surveillance would be limited to those important criminal investigations in which the technique would be a particularly valuable law enforcement tool. Since the IRS regulations were not by their nature necessarily intended for the benefit of respondent and similarly situated persons, they stand in marked contrast to the regulations in *Accardi*, *Service*, and every other case in which this Court has required an agency to comply with its own rules.

B. Although the Due Process Clause prohibits the government from obtaining an unfair advantage over persons who have reasonably relied on official pronouncements intended to guide their actions, respondent could not possibly have made his incriminating statements to Agent Yee in reliance upon the IRS regulations. Respondent did not know that his conversations were being recorded. *A fortiori*, he did not know that they were being recorded without Justice Department approval. His behavior would not have differed in any respect if the agents had actually obtained monitoring authority pursuant to IRS Manual ¶ 652.22(1), as the court of appeals insisted they should have done, instead of proceeding on the basis of emergency authorizations given by IRS personnel under ¶ 652.22(6).

C. All else aside, it makes little sense to conclude that the conduct of the IRS agents deprived respondent of due process, because the failure to comply with the regulations was plainly immaterial. The Justice Department's approval of the monitoring of the February 11 conversation conclusively demonstrates that Department officials charged with the government's criminal enforcement effort considered this to be a case appropriate for consensual electronic surveillance and that they would have authorized the recording of the January 31 and February 6 conversations if their consent had been sought in advance of those meetings.

D. Because the IRS regulations were not adopted for respondent's benefit, because his incriminating statements could not have been made in reliance upon

the regulations, and because the recording of the conversations would have been approved by Department of Justice officials if the proper procedures had been scrupulously observed, respondent cannot offer a plausible showing of prejudice as a result of the violation of the IRS regulations. But even if he could, this case nonetheless would not present a legitimate occasion for application of the drastic remedy of the exclusionary rule. The suppression remedy, this Court has said time and again, is not "a personal constitutional right of the party aggrieved" (*United States* v. *Calandra*, 414 U.S. 338, 348), and "if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice" (*Stone* v. *Powell*, 428 U.S. 465, 491). Hence, even in the face of the Fourth Amendment violations, "the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348.

Whatever the proper role of the exclusionary rule upon proof of repeated and deliberate violations of agency regulations, its application is wholly inappropriate here, where the noncompliance was isolated and accidental. The deterrent effect of suppression in such circumstances is negligible, and, indeed, imposition of the harsh sanction of exclusion of relevant evidence might have the effect of discouraging agencies from adopting beneficial rules circumscribing the discretion of their employees.

II. The court of appeals also was powerless to order suppression under its "supervisory" powers.

Although the source and proper scope of those powers is uncertain, this Court has articulated two important restrictions on their exercise. First, the judicial supervisory power is subordinate to the paramount authority of Congress to declare, within constitutional limitations, what practices and procedures will govern trials in the federal courts. Second, even when not precluded by an Act of Congress, the courts' use of supervisory powers to exclude material evidence must be "sparingly exercised," and then only when justified by "overriding considerations" (*Lopez* v. *United States*, 373 U.S. 427, 440).

Two acts of Congress—Rule 402 of the Federal Rules of Evidence and 18 U.S.C. 3501—barred the court's exercise of its supervisory powers to suppress evidence of respondent's relevant and voluntary self-incriminating statements to Agent Yee. Beyond that, suppression would also be inappropriate here as a means of supervision, because there was no "manifestly improper conduct by federal officials." *Lopez* v. *United States*, *supra*, 373 U.S. at 440.

ARGUMENT

THE FAILURE OF AN EXECUTIVE AGENCY TO COMPLY WITH INTERNAL REGULATIONS THAT ARE NOT REQUIRED BY THE CONSTITUTION OR BY STATUTE DOES NOT JUSTIFY THE SUPPRESSION OF OTHERWISE ADMISSIBLE AND PROBATIVE EVIDENCE IN A CRIMINAL CASE

It is undisputed that the surreptitious monitoring and recording of the conversations between Agent Yee and respondent, all of which occurred with Agent

Yee's consent, violated neither the Constitution (see *United States* v. *White*, 401 U.S. 745, 752 (plurality opinion); *Lopez* v. *United States*, 373 U.S. 427, 437-439) nor federal statutes (see 18 U.S.C. 2511(2)(c)).[3] The court of appeals' suppression of these recordings in respondent's bribery prosecution was therefore premised solely upon the determination that the Internal Revenue Service had neglected to follow its internal operating procedures requiring approval from specified officials in the Department of Justice prior to consensual electronic recording of face-to-face encounters with taxpayers (Pet. App. 8a-9a).[4]

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[3] See, *e.g.*, *United States* v. *Hall*, 536 F. 2d 313, 327 (C.A. 10), certiorari denied, 429 U.S. 919; *United States* v. *Ransom*, 515 F. 2d 885, 890 (C.A. 5), certiorari denied, 424 U.S. 944; *United States* v. *Armocida*, 515 F. 2d 49, 52 (C.A. 3), certiorari denied, 423 U.S. 858.

[4] Although the correctness of the Ninth Circuit's holding that the IRS regulations were violated is not presented here, we note that that conclusion is far from apparent. As discussed above (see p. 8, *supra*), the Attorney General's Memorandum provides that, except in "exigent circumstances," all federal agencies must obtain advance authorization from the Department of Justice before recording any non-telephonic conversation. In the event that an authorization request cannot be submitted to the Justice Department at least 48 hours in advance of the time of the intended recording, subordinate officials designated by the agency head may approve the monitoring on an emergency basis. The IRS Manual implements this memorandum by authorizing the Director of the Internal Security Division or the Assistant Commissioner (Inspection) to grant approval for monitoring that is to take place less than 48 hours from the time of request. The record shows that Inspector Hill sought approval for the surveillance on January 30 or 31, prior to the initial

The opinion of the court of appeals is less clear, however, in articulating the basis upon which it rested its remedy for the violation—*i.e.*, whether it believed suppression was appropriate because the governmental conduct in this case offended due process, or whether it acted in the exercise of its supervisory powers. Parts of the opinion may be read to support either interpretation. The court of appeals' remark that "[w]e do not say that agencies always violate due process when they fail to adhere to their procedures" (Pet. App. 11a) certainly suggests a constitutional underpinning for the suppression order in this case. On the other hand, the court's statement

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recording, and that, a response not having been received, the appropriate IRS officials granted emergency authorization to monitor and record the January 31 and February 6 meetings.

Although the court of appeals held that there was not a valid "emergency" because Agent Yee had selected the dates for the meetings (Pet. App. 8a), we believe that the IRS and the Department of Justice were in a far better position to judge whether there had been substantial compliance with their regulations. The court's ruling in effect imposes a requirement that government's investigatory agents must attempt to arrange meetings with suspects more than 48 hours in advance if they believe that a recording of the conversation would be advisable, so that advance approval may be obtained from the Attorney General. Such a restriction is nowhere to be found in the Attorney General's Memorandum or in the IRS Manual, and it fails to take account of the realities of criminal investigations. Application of the "emergency" exception should not depend upon who proposes the date of the recorded meeting. In any event, whatever the legitimacy of the rule fashioned by the court of appeals in other circumstances, it has no application here, since nothing in the record suggests that Agent Yee manipulated the timing of the two meetings in order to avoid seeking Department of Justice approval.

that "the suppression of evidence because of non-compliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach" (*id.* at 10a) indicates that the court may have been relying on its supervisory powers, since without a finding that the Constitution or a federal statute required suppression there would be no other authority for the court's action.

It matters little which rationale underlies the court of appeals' exclusion of the recorded conversations. The failure of an executive agency to comply with its internal regulations, at least where, as here, those regulations were not relied on by the defendant and were not intended for his benefit, does not justify the suppression of otherwise admissible and probative evidence in a criminal case.

I. The Internal Revenue Service's Failure to Obtain Approval from the Department of Justice Prior to Recording the January 31 and February 6 Conversations Did Not Deprive Respondent of Due Process of Law.

This Court has interpreted the Due Process Clause as "a summarized constitutional guarantee of respect for those personal immunities which * * * are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' * * * or are 'implicit in the concept of ordered liberty.' " *Rochin* v. *California*, 342 U.S. 165, 169, citing *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 and *Palko* v. *Connecticut*, 302 U.S. 319, 325. While the Clause thus places a substantial duty of fair dealing upon the government, its re-

quirements are not boundless and do not encompass every investigative or prosecutorial practice that the judiciary believes to be wise. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559-561. As the Court recently observed, "[j]udges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' " *United States* v. *Lovasco*, 431 U.S. 783, 790, quoting from *Rochin* v. *California*, *supra*, 342 U.S. at 170. See also *United States* v. *Russell*, 411 U.S. 423, 435. The task of a court when confronted by a due process claim is to determine whether the official conduct violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U.S. 103, 112, and that define "the community's sense of fair play and decency." *Rochin* v. *California*, *supra*, 342 U.S. at 173. Judged by these standards, the Internal Revenue Service's good faith failure to comply fully with the procedures outlined in its manual prior to recording respondent's conversations with Agent Yee does not even come close to supporting a claim that respondent was denied due process.

There is, to begin with, no principle of constitutional law that requires unyielding agency adherence to regulations. The cases most often cited for the contrary proposition are *Accardi* v. *Shaughnessy*, 347 U.S. 260, which involved Department of Justice regulations setting forth the procedure to be followed in processing an alien's application for sus-

pension of deportation, and two similar cases decided in *Accardi*'s wake, *Service* v. *Dulles*, 354 U.S. 363, and *Vitarelli* v. *Seaton*, 359 U.S. 535. The Court held in *Accardi* that the Department's regulations had "the force and effect of law" (*id.* at 265) and that they bound the Attorney General so long as they remained extant (*id.* at 267). This ruling, however, concerned the adjudicatory rather than the prosecutive functions of the Department of Justice and was grounded on principles of administrative procedure, not notions of due process transferable to other contexts. As the Court explained last Term, "both *Service* and *Accardi* * * * enunciate principles of federal administrative law rather than of constitutional law binding upon the States." *Board of Curators* v. *Horowitz*, No. 76-695, decided March 1, 1978, slip op. 14 n.8. See also *Vitarelli* v. *Seaton*, *supra*, 359 U.S. at 547 (opinion of Frankfurter, J.) (describing holding in *Service* as a "judicially evolved rule of administrative law"); *Bates* v. *Sponberg*, 547 F. 2d 325, 330 (C.A. 6).

Hence, the conclusion that the conduct of the IRS agents violated respondent's due process rights must be based on more than the agency's mere failure to follow its own rules. There must also be a showing that the oversight operated to treat respondent unfairly, in a way that offends "the community's sense of fair play and decency." *Rochin* v. *California*, *supra*, 342 U.S. at 173. After all, "[t]he limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in

question violates some protected right of the *defendant*." *Hampton* v. *United States*, 425 U.S. 484, 490 (plurality opinion; emphasis in original). In the present case there is no conceivable basis on which to predicate a violation of respondent's due process rights.

A. *The IRS Instructions to its Agents Were Not Intended to Create Rights Enforceable by a Defendant in a Criminal Case*

The IRS regulations at issue here, particularly IRS Manual ¶ 652.22, were promulgated in response to the Attorney General's October 1972 Memorandum entitled "Monitoring Private Conversations with the Consent of a Party" (Pet. App. 6a). In this memorandum, the Attorney General clearly explained the purpose of the agency regulations (App., *infra*, p. 5a):

> [A]lthough it is clear that [monitoring of conversations with the consent of one of the participants] is constitutionally and statutorily permissible—and therefore that it may be conducted without judicial warrant—it is appropriate that this investigative technique continue to be the subject of careful self-regulation by the Executive Branch of the Federal Government.

To achieve this end of "self-regulation," the Attorney General made Department of Justice officials responsible for the approval of all such government surveillance. He required that he or his delegate authorize any consensual monitoring in advance, and he detailed

the procedures for securing such authorization. These include a written statement of the reasons for the monitoring, including the role of the suspect in the investigation, as well as the duration and place of the electronic surveillance and the means by which it is to be accomplished (*id.* at 6a). Requests must ordinarily be submitted at least 48 hours prior to the proposed monitoring, but, when exigent circumstances preclude compliance, "emergency monitoring may be instituted under the authorization of the head of the responsible department or agency or other agency official or officials designated by him" (*id.* at 7a). In addition, careful recordkeeping of the use of surveillance equipment is required (*id.* at 9a).

Nothing in the Attorney General's Memorandum or the IRS Manual suggests that these procedures were intended to grant citizens protection against electronic monitoring of conversations beyond those already provided by the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, much less that those protections were intended to be enforceable in court. To the contrary, the rules requiring centralized decision-making plainly were designed "to provide some degree of internal governmental supervision over consensual overhearings" (*United States* v. *Kline*, 366 F. Supp. 994, 997 (D. D.C.))—that is, to obtain consistency in the utilization of costly, relatively uncommon, and marginally more intrusive investigative tools such as electronic monitoring, and to limit

such investigative techniques to instances where they would provide substantial assistance to law enforcement. Thus, the regulations "express[ ] a policy that is for the benefit of the people as a whole, but not one that may fairly be characterized as expressly designed to protect the personal rights of defendants." *United States* v. *Walden*, 490 F. 2d 372, 377 (C.A. 4) (footnote omitted), certiorari denied, 416 U.S. 983.[5]

As such, they stand in marked contrast to the internal regulations in *Accardi*, which involved "safeguards against essentially unfair procedures" designed "to protect the interests of the alien and to

[5] Respondent's contention (Br. in Opp. 13) that the IRS regulations were "intended to protect taxpayers, like Dr. Caceres, whom the IRS has under investigation or suspicion" stems from the unwarranted assumption that any internal agency requirement that serves to increase the difficulty of ferreting out proof of crime or of initiating a prosecution must have been meant for the benefit of those under investigation. This unsophisticated analysis cannot be correct, for virtually every regulation circumscribes the agent's discretion to some extent. Respondent's assumption fails to appreciate that many internal operating procedures, like IRS Manual ¶ 652.22, may have as their principal concern the efficiency of or the discipline within the agency and that any accompanying decrease in the agency's ability to pursue its investigations as fully as the Constitution or federal statutes allow may be nothing more than an unwelcome but unavoidable consequence. This is especially likely to be true in the case of regulations, such as those at issue here, that cannot affect the conduct of persons dealing with the agency.

afford him due process of law" (*Bridges* v. *Wixon*, 326 U.S. 135, 152, 153, cited in *Accardi* v. *Shaughnessy*, *supra*, 347 U.S. at 265 n. 7), or those in *Service* and *Vitarelli*, which also were intended to guarantee procedural fairness to the subjects of quasi-adjudicatory administrative proceedings (see *Service* v. *Dulles*, *supra*, 354 U.S. at 373; *Vitarelli* v. *Seaton*, *supra*, 359 U.S. at 540), or in *Yellin* v. *United States*, 374 U.S. 109, which concerned the refusal of the House Committee on Un-American Activities to follow rules that by their own terms were required to be distributed to each witness appearing before the Committee (*id.* at 123) and whose "dominant theme [was] definition of the witness' rights and privileges" (*id.* at 115).[6]

Indeed, on the occasions that this Court has confronted agency rules not primarily intended to benefit the accused, it has refused to grant relief over the agency's objection. In *Sullivan* v. *United States*, 348 U.S. 170, for example, the Court unanimously declined to dismiss an indictment obtained in violation of a Department of Justice directive that prohibited the submission of any income tax case to a grand jury without the prior approval of the Attorney General. Without citing *Accardi*, which had been decided only months earlier, the Court construed the guidelines as simply "housekeeping provision[s]," designed (like the IRS Manual) to achieve uniformity in the administration of the revenue laws, and held that they were not subject to judicial enforcement at the behest of a defendant (*id.* at 173):

> It was not the purpose of the Executive Order to direct how the responsibility should be exercised but to fix it in the Department of Justice. How that responsibility was to be discharged was a matter for the Department.

And in *Rinaldi* v. *United States*, 434 U.S. 22, which involved a violation of the Justice Department's "*Petite* policy," prohibiting a federal prosecution following a state prosecution for the same act except when necessary to advance compelling interests of federal law enforcement, the Court stressed that the policy (again like the IRS Manual) was not constitutionally mandated (*id.* at 29), that it was promulgated in an effort to centralize authority in the Department's most responsible officials over a particularly sensitive class of prosecutions (*id.* at 28-29), and that a defendant should therefore receive the benefit of the policy "whenever its application is urged *by the Government*" (*id.* at 31; emphasis added).[7] See also *American Farm Lines* v. *Black Ball*

[6] See also *United States* v. *Nixon*, 418 U.S. 683, 695-697, requiring the President to adhere to regulations promulgated for the benefit of the Special Prosecutor.

[7] The clear implication of this statement, that the Department's dual prosecution policy would not be enforced over the government's objection, is consistent with the unanimous decisions of the courts of appeals. See, *e.g.*, *United States* v. *Musgrove*, C.A. 4, No. 77-1971, decided August 7, 1978; *United States* v. *Thompson*, C.A. 10 (*en banc*), No. 76-1883, decided June 15, 1978, pending on petition for a writ of certiorari, No. 78-5087; *United States* v. *Fritz*, C.A. 10 (*en banc*), No. 77-1027, decided July 3, 1978; *United States* v. *Wallace*, C.A. 8, No. 77-1558, decided June 13, 1978; *United States* v. *Nelli-*

Freight Service, 397 U.S. 532, 538-539 (excusing an agency's failure to follow its own regulations because "[t]he rules were not intended primarily to confer important procedural benefits upon individuals * * *"); *United States* v. *Mapp*, 561 F. 2d 685, 690 (C.A. 7); *Associated Press* v. *Federal Communications Commission*, 448 F. 2d 1095, 1104 (C.A. D.C.); *United States* v. *Lockyer*, 448 F. 2d 417, 421 (C.A. 10).

There can, in short, be no unfairness in refusing to accord a defendant the benefit of an agency regulation that was neither required by the Constitution or by federal statutes nor adopted for his protection. The requirement of the IRS Manual that Department of Justice approval be obtained prior to the recording of face-to-face conversations was "simply a housekeeping provision of the Department" (*Sullivan* v. *United States*, *supra*, 348 U.S. at 173); the government officials who acted contrary to these instructions are of course "answerable to the Department" (*id.* at 174), but their conduct is not subject to challenge on due process grounds.[8]

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gan, 573 F. 2d 251, 255 (C.A. 5); *United States* v. *Welch*, 572 F. 2d 1359, 1360 (C.A. 9), pending on petition for a writ of certiorari, No. 77-6684; *United States* v. *Chavez*, 566 F. 2d 81 (C.A. 9); *United States* v. *Hutul*, 416 F. 2d 607, 626-627 (C.A. 7), certiorari denied *sub nom. Sacks* v. *United States*, 396 U.S. 1007.

[8] The IRS regulations provide for disciplinary action, including removal from the Service, for employees who knowingly violate those regulations. IRS Manual ¶ 652.1(3).

B. *Respondent's Conduct Could Not Have Been Affected by the Noncompliance With the IRS Regulations*

The Due Process Clause undoubtedly prevents the government from obtaining an unfair advantage over persons who have reasonably relied on official pronouncements intended to guide their actions. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 559, 569-571; *Raley* v. *Ohio*, 360 U.S. 423, 437-439. This reliance factor was a pivotal feature in *Yellin* v. *United States*, *supra*, 374 U.S. at 119-120, the only instance in which this Court has granted relief in a criminal case because of noncompliance with voluntarily-adopted rules, and was the crucial underpinning of the holdings in *United States* v. *Heffner*, 420 F. 2d 809 (C.A. 4), *United States* v. *Leahey*, 434 F. 2d 7 (C.A. 1), and *United States* v. *Sourapas*, 515 F. 2d 295 (C.A. 9), the sole authorities cited by the court of appeals to support its exclusion of the recorded conversations between respondent and Agent Yee.[9]

Heffner, *Leahey* and *Sourapas* concerned IRS regulations that required special agents investigating criminal tax fraud to give *Miranda*-type warnings to subjects of their investigation prior to conducting non-

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[9] Later decisions have stated unequivocally that *Heffner*, *Leahey* and *Sourapas* were grounded on due process. See *United States* v. *Newell*, C.A. 9, No. 77-3685, decided July 19, 1978, slip op. 2341; *United States* v. *Jobin*, 535 F. 2d 154, 157 (C.A. 1); *United States* v. *Griglio*, 467 F. 2d 572, 576 (C.A. 1); *United States* v. *Bembridge*, 458 F.2d 1262, 1264-1265 (C.A. 1); *Hollingsworth* v. *Balcom*, 441 F. 2d 419, 421-422 (C.A. 6).

custodial interviews.[10] In each case the agent neglected to deliver the prescribed warnings, the suspect made damaging admissions, and the court of appeals ordered the statements suppressed.

The justification for suppression, however, was not merely that the agency had violated its own regulations, but that the violation may have induced the taxpayer to alter his behavior to his detriment. As the Fourth Circuit explained in *Heffner*, if the IRS agent had followed the required procedures by giving *Miranda* warnings, the taxpayer would have been put on notice of his status as a suspect and would have been in a position to choose intelligently whether to make a statement or to decline to be interviewed, whether to sign the written transcript of the interview, and whether to seek the advice of counsel. 420 F. 2d at 813. Furthermore, in light of the wide publication given the IRS regulation, it was possible that the taxpayer had assumed that the agent's failure to inform him of his status as a target was an implicit representation that he was not suspected of criminal tax fraud. *United States* v. *Leahey, supra*, 434 F. 2d at 10-11. See also *United States* v. *Jobin*, 535 F. 2d 154, 158-159 (C.A. 1).

[10] See IRS News Release Nos. 897, issued October 3, 1967, and 949, issued November 26, 1968, reprinted in *United States* v. *Heffner, supra*, 420 F. 2d at 811, and *United States* v. *Sourapas, supra*, 515 F. 2d at 297 n. 2. See also *United States* v. *Jobin, supra*, 535 F. 2d at 156 n. 3. These warnings are not required by the Constitution. *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495; *Beckwith* v. *United States*, 425 U.S. 341.

The arguments set forth elsewhere in this brief demonstrate, we believe, the impropriety of suppression even in the circumstances of *Leahey, Heffner* and *Sourapas*—which like this case involved a regulation that did not apply to trial-type proceedings—and the result of those cases has been judicially questioned. See *United States* v. *Leonard*, 524 F. 2d 1076, 1089 (C.A. 2) (Friendly, J.), certiorari denied, 425 U.S. 958; *United States* v. *Lehman*, 468 F. 2d 93, 104-105 (C.A. 7), certiorari denied, 409 U.S. 967.[12] But whatever may have been the correct result in those three cases, there is no reason to find a due process violation in the situation here.

Respondent did not know that his conversations were being recorded. *A fortiori*, he did not know that they were being recorded without Justice Department approval. His behavior in the face-to-face meetings with Agent Yee would not have differed one iota if Inspector Hill had applied for monitoring authority pursuant to IRS Manual ¶ 652.22(1) instead of

[11] [Omitted]

[12] The First Circuit has limited *Leahey* in *United States* v. *Bembridge, supra*, 458 F. 2d at 1264 ("substantial compliance" is sufficient), and *United States* v. *Morse*, 491 F. 2d 149, 156 ("substance and spirit of such procedures, and not their literal form" must be followed). See also *United States* v. *Jobin, supra*, 535 F. 2d at 157. Other courts have followed a similar analysis. See, *e.g.*, *United States* v. *Bettenhausen*, 499 F. 2d 1223, 1231 (C.A. 10) (suspect must demonstrate a "substantial omission" prejudicing him); *United States* v. *Dawson*, 486 F. 2d 1326, 1330 (C.A. 5) (substantial compliance sufficient); *United States* v. *Mathews*, 464 F. 2d 1268, 1270 (C.A. 5) (literal compliance not required).

¶ 652.22(6) or if valid authorization had been obtained from the Attorney General in advance of the meetings.[13] By the same token, even if respondent had been aware of the IRS regulations prior to his conversations with Agent Yee, he could not possibly have made his incriminating statements in reliance upon the agent's compliance with the prescribed procedures. See *United States* v. *White*, *supra*, 401 U.S. at 752; *United States* v. *Gentile*, 525 F. 2d 252 (C.A. 2), certiorari denied, 425 U.S. 903; *United States* v. *Bland*, 458 F. 2d 1, 8 (C.A. 5), certiorari denied, 409 U.S. 843.[14] Violations of agency regulations that, ob-

[13] Respondent was of course well aware at all times that he was speaking to an IRS agent.

[14] In *United States* v. *Gentile*, *supra*, the court of appeals refused to exclude evidence of a bribe offer to an IRS agent despite the agent's failure to have complied fully with the regulation requiring that targets be given *Miranda* warnings in non-custodial interrogation. Judge Friendly explained (525 F. 2d at 259; citations omitted):

> The purpose behind the stipulation by the IRS of these procedures for special agents was to extend the protection of *Miranda* v. *Arizona*, 384 U.S. 436 * * * (1966), to criminal tax investigations conducted in a non-custodial setting. *United States* v. *Leahey*, *supra*, 434 F. 2d at 8. A failure to give *Miranda* warnings, however, even in a custodial setting, would not prevent a prosecution for an attempt to bribe a law enforcement officer made subsequent to the arrest. * * * [T]he basic purpose of *Miranda*, to prevent abusive police interrogation of persons not aware of their right to remain silent, hardly extends to tax evaders whose quick reaction is to offer to bribe the investigating officer and are then prosecuted for doing so. It seems even more unlikely that the IRS intended its News Releases to bar a Special Agent from telling the full story of an attempt to bribe him simply because he had failed to give the specified warnings.

served or not, can have no possible bearing on how individuals under investigation will conduct themselves cannot be said to deprive such individuals of due process of law.

C. *Compliance With the IRS Regulations Would Not Have Affected the Ultimate Outcome of the Agency's Action*

All else aside, it makes little sense to conclude that a violation of agency regulations has denied due process—much less to exclude probative and reliable evidence in a criminal trial as a sanction—if the violation had no bearing on the agency's ultimate actions. In such circumstances, although every procedural requirement may not have been observed, it can hardly be said that the person dealing with the agency was treated unfairly; suppression would be "a wasteful ritual" that would serve only to breed disrespect for the system and to afford the opposing party a "windfall." Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 634 (1974). If a "harmless error" rule may be applied to excuse inconsequential Executive Branch violations of the Constitution (see *Chapman* v. *California*, 386 U.S.

Cf. *United States* v. *Mandujano*, 425 U.S. 564, 583; *id.* at 585 (Brennan, J., concurring); *United States* v. *Wong*, 431 U.S. 174, 180 (Due Process Clause does not require suppression of false grand jury testimony, because the failure to receive Fifth Amendment warnings would not induce a witness to commit perjury).

18), federal statutes (see 28 U.S.C. 2111; *United States* v. *Chavez*, 416 U.S. 562, 575), and rules of criminal procedure (see Fed. R. Crim. P. 52(a); *Hamling* v. *United States*, 418 U.S. 87, 131-135), it certainly should be equally available in cases of an agency's noncompliance with self-imposed requirements.

There can be no serious dispute that the Department of Justice would have authorized Agent Yee's recording of his conversations with respondent if approval had properly been requested under the IRS Manual. As we have already noted, the Justice Department and IRS regulations at issue here were designed to permit responsible government officials to control the actions of their subordinates in an area of some sensitivity, so that consensual electronic surveillance would be limited to those important criminal investigations in which the technique would be a particularly valuable law enforcement tool. A taxpayer's bribe offers to influence the conduct of an IRS agent's official responsibilities is certainly a proper subject for such surveillance. Indeed, when a conversation constitutes not just evidence of a crime, but the crime itself, it is especially important to have the most reliable evidence possible of what was said. *United States* v. *White*, *supra*, 401 U.S. at 753 (plurality opinion).[15]

This conclusion does not rest on speculation: the Department of Justice approved monitoring on February 10, 1975, demonstrating that it considered this case to be appropriate for the use of a consensual re-

15. [See next page.]

cording device. It is inconceivable to suppose that such approval would have been withheld if Inspector Hill's written request had been received in the Department on January 31 rather than a week later. Accordingly, Agent Yee's recording of his meetings with respondent on January 31 and February 6, although not sanctioned by the Justice Department in advance, did not constitute agency conduct that would have been proscribed if the proper procedures had been followed.

D. *The Policies Underlying the Exclusionary Rule Do Not Justify Suppression of the Probative and Relevant Evidence Contained on the Tape Recordings Because of the IRS's Good Faith Violation of Its Internal Regulations*

The discussion thus far has demonstrated that the IRS agents' monitoring of respondent's conversations prior to obtaining Justice Department authorization did not violate the Due Process Clause. The regulations were not adopted for respondent's benefit, his incriminating statements could not have been made in reliance upon the regulations, and the recording of the conversations would have been authorized by the proper officials if the prescribed procedures had been scrupulously observed. Even were these conclusions less clear, however, suppression of the highly incriminating evidence contained on the tape recordings would nonetheless not be warranted in the circum-

[15] Recordings also are important because they reveal tone and inflection often necessary to evaluate the meaning of spoken words.

stances of this case. All of respondent's Fourth Amendment and statutory rights were respected by the agents, and suppression of the recordings solely because of the IRS's good faith failure to follow its internal regulations would not further any of the policies justifying application of an exclusionary rule, and indeed might work against them.[16]

The core objective of the judicially-created exclusionary rule is the deterrence of unlawful government conduct in order to effectuate constitutional guarantees, especially the Fourth Amendment's protection against unreasonable searches and seizures. *United States* v. *Peltier*, 422 U.S. 531, 536-539; *United States* v. *Calandra*, 414 U.S. 338, 347; *Elkins* v. *United States*, 364 U.S. 206, 217. As the Court explained in *Michigan* v. *Tucker*, 417 U.S. 433, 447:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused.

[16] Although the Court has remarked—in instances quite distinguishable from the present case—that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures," *Morton* v. *Ruiz*, 415 U.S. 199, 235, it has never suggested that this requirement should be enforced by the suppression of evidence. The remedy for the violations in *Accardi*, *Service* and *Vitarelli*, for example, was a remand to allow the agency to conduct a new administrative hearing. The sanction the court applied in this case, on the other hand, would entail an irremediable loss of evidence.

Despite its broad deterrent purpose, however, "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Recognizing that the suppression remedy is not "a personal constitutional right of the party aggrieved" (*id.* at 348) and that "if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice" (*Stone* v. *Powell*, 428 U.S. 465, 491), this Court on a number of occasions has declined to extend the exclusionary rule to situations in which the effectiveness of the sanction in deterring improper official conduct was outweighed by the significant societal costs that the rule exacts by excluding relevant evidence of criminal activity. See, *e.g.*, *Franks* v. *Delaware*, No. 77-5176, decided June 26, 1978, slip op. 11; *Stone* v. *Powell*, *supra*, 428 U.S. at 489; *United States* v. *Janis*, 428 U.S. 433, 454.

Even assuming that the exclusionary rule might properly be invoked upon proof of repeated and deliberate violations of agency regulations, so far as the record shows the noncompliance in this case was iso-

lated and accidental.[17] If the want of deterrent impact renders the exclusionary rule inapplicable in cases involving constitutional or statutory[18] violations, then surely it has no place where its deterrent effect would be negligible and the violation amounted to no more than an inadvertent non-compliance with an internal agency regulation. See *United States* v. *Feaster*, 494 F. 2d 871, 875-876 (C.A. 5), certiorari denied, 419 U.S. 1036; *United States* v. *Walden*, *supra*, 490 F. 2d at 376-377.[19] The appropriate rem-

[17] There is no basis for respondent's accusation (Br. in Opp. 11 n. 5) that the IRS, which believed in both instances that the situation called for application of the emergency authorization procedures of its regulations, acted in bad faith in failing to secure advance Department of Justice approval for the monitoring of the January 31 and February 6 meetings between Agent Yee and respondent. To the contrary, Inspector Hill completed his written request for monitoring authorization prior to January 31, although for unexplained reasons it was not delivered to the Justice Department by the IRS National Office until February 7. Neither court below found that the agent's conduct was motivated by a desire to circumvent the requirements of IRS Manual ¶ 652.22(1) and (2), and in light of the fact that approval was promptly granted when the request reached the Justice Department, no motive appears that would support a conclusion of willful misconduct.

[18] See, *e.g.*, *United States* v. *Donovan*, 429 U.S. 413; *United States* v. *Mendel*, C.A. 7, No. 77-1421, decided May 10, 1978, slip op. 10-11, pending on petition for a writ of certiorari, No. 78-144; *United States* v. *Amendola*, 558 F. 2d 1043, 1045 (C.A. 2); *United States* v. *Turner*, 558 F. 2d 46, 52-53 (C.A. 2); *United States* v. *Burgard*, 551 F. 2d 190, 193 (C.A. 8).

[19] See *United States* v. *Burke*, 517 F. 2d 377 (C.A. 2) (Friendly, J.), refusing to suppress evidence seized pursuant to a warrant that failed to conform to several nonconstitu-

edy for any infraction of IRS regulations in such circumstances is a matter for the Executive Branch, not the court of appeals, to determine. *Sullivan* v. *United States*, *supra*, 348 U.S. at 174; *United States* v. *Leonard*, *supra*, 524 F. 2d at 1089.[20]

The court of appeals nonetheless applied an exclusionary rule without undertaking any analysis of the necessity for that sanction to encourage agency compliance with its regulations. There is no empirical evidence that such strong medicine was required. Violations of the IRS Manual are not widespread. Furthermore, executive departments have substantial

tional requirements of Rule 41, Fed. R. Crim. P. The court said that the exclusionary rule is "'a blunt instrument, conferring an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large.' For that reason courts should be wary in extending the exclusionary rule * * * to violations which are not of constitutional magnitude" (*id.* at 386; footnote omitted).

[20] The Fourth Amendment exclusionary rule was formulated to protect important constitutional rights in the absence of any meaningful alternative sanction. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411-424 (Burger, C. J., dissenting). Since the Amendment itself provides no remedy for its violation, it was legitimate for the judiciary to imply one in light of the magnitude of the interests at stake. It is quite another matter for the courts to imply a suppression remedy for violations of requirements embodied in regulations that explicitly provide for other remedies. Here, for example, IRS Manual ¶ 652.1(3) states that disciplinary action may be taken against employees who knowingly violate the regulations. Having created and defined the legal standard, the agency should have plenary authority to determine the appropriate sanction for noncompliance.

incentives, wholly apart from any penalties imposed by the courts, to ensure that their own procedures, presumably adopted for their own benefit, are observed—incentives that might well be absent when the procedure has been imposed by the Constitution or by statute. See *United States* v. *Leonard*, *supra*, 524 F. 2d at 1089. There is no better example of this self-regulation than the Department of Justice's enforcement of its "*Petite* policy" (see page 25, *supra*). The Department frequently declines to authorize dual prosecutions in cases not presenting compelling circumstances, and it has not hesitated to seek dismissal of indictments obtained in violation of the policy, even after conviction. See, *e.g.*, *Rinaldi* v. *United States*, *supra*; *Frakes* v. *United States*, No. 77-5742, decided March 6, 1978; *Watts* v. *United States*, 422 U.S. 1032; *Ackerson* v. *United States*, 419 U.S. 892. See also *Redmond* v. *United States*, 384 U.S. 264 (violation of obscenity prosecution guidelines).

Moreover, there are strong countervailing interests that militate in favor of admitting the recordings in this case. The court of appeals did not rule that Agent Yee could not testify at respondent's trial about the alleged bribe offers that occurred on January 31 and February 6, 1975 (see Pet. App. 11a), and we know of no reason why such testimony would be disallowed. Suppression of the recordings of those transactions thus disserves the fact-finding function of the trial, since "[a]n electronic recording will many times produce a more reliable rendition of

what a defendant has said than will the unaided memory of a police agent" (*United States* v. *White*, *supra*, 401 U.S. at 753 (plurality opinion)).

An even more important consideration is that the extension of the exclusionary rule to cases such as this is not only unjustified by the policies underlying the rule, but actually tends to produce results that are contrary to those that the rule seeks to foster. The broad role of the exclusionary rule is to encourage governmental respect for citizens' constitutional and statutory rights, rights that were not created, and obviously cannot be abolished, by the Executive Branch. Many government agencies have voluntarily adopted internal guidelines and regulations that have an essentially similar purpose: to protect societal or individual interests that, while not so fundamental as to command constitutional or statutory protection, are nonetheless significant. The adoption of these regulations, unlike the Constitution or statutes, rests in the unfettered discretion of the individual agencies.

Such guidelines should obviously be encouraged. By imposing objective standards they promote respect for the law and uniformity in treatment by government officials, undeniable goals of the criminal justice system. Use of the exclusionary rule to punish the government for an inadvertent failure to follow its regulations, however, will inevitably tend to discourage adoption of such regulations in the first place. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 474 n. 580 (1974).

The decision whether to promulgate such regulations involves a careful balancing of costs and benefits. If minor deviations from self-imposed rules cause evidence to be lost, agencies may reasonably determine that the logical alternative is to cease self-regulation altogether in favor of increased *ad hoc* and diffuse decisionmaking. Hence, application of the suppression remedy in this context will give the defendant "an altogether disproportionate reward" (*United States* v. *Burke*, *supra*, 517 F. 2d at 386), yet society will receive no offsetting benefit. Indeed, society will suffer twice: criminal prosecutions will be impeded, and the government will be deterred from adopting salutary rules and practices that go beyond what the Constitution or a statute may require.

II. The Court Of Appeals Had No Supervisory Power To Suppress The Lawful Recordings Of Respondent's Conversations With Agent Yee

We remarked at the outset that it was uncertain whether the court of appeals' suppression of the tape recorded conversations between respondent and Agent Yee had been based upon the application of a constitutional exclusionary rule or upon the court's supervisory power over proceedings in the district courts in its circuit. Although the conclusion cannot be asserted with assurance in light of the ambiguities in the court's opinion, it seems tolerably clear that the court of appeals did not purport to be exercising supervisory authority. The court nowhere mentioned its supervisory powers, and the only

cases it cited to support suppression of the evidence involved constructions of the Due Process Clause. See page 27, note 9, *supra*.[21] What is more, the Ninth Circuit in a number of recent cases has disclaimed reliance on a broad "supervisory power" over the actions of coordinate branches of government. See *United States* v. *Hall*, 559 F. 2d 1160, 1164 and n. 2 (C.A. 9), certiorari denied, No. 77-974, March 27, 1978; *United States* v. *Chanen*, 549 F. 2d 1306, 1313 (C.A. 9), certiorari denied, 434 U.S. 825.

If, despite these indications to the contrary, the court of appeals in fact suppressed the tape recordings in the exercise of its supervisory authority, it erred for the reasons we have elaborated in our brief in *United States* v. *Jacobs*, No. 76-1193, certiorari dismissed as improvidently granted, May 1, 1978.[22] As we discussed in *Jacobs*, whatever the source and proper scope of the judicial supervisory powers, this Court's decisions clearly establish two limitations on its exercise. First, the supervisory power is subordinate to the paramount authority of Congress to declare, within constitutional limitations, what practices and procedures will govern trials in the federal courts. This limitation was adverted to in *McNabb* v. *United States*, 318 U.S. 332, 341 n. 6, and expressly declared in *Palermo* v. *United States*, 360 U.S. 343, 353 n. 11: "The power of this Court to prescribe rules of procedure and evidence for the

[21] See also *United States* v. *Newell*, *supra*, slip op. 2341.

[22] We are sending respondent a copy of our brief in *Jacobs*.

federal courts exists only in the absence of a relevant Act of Congress." [23]

Second, even when not precluded by an Act of Congress, the courts' use of supervisory powers to exclude material evidence must be "sparingly exercised," and then only when "overriding considerations" justify it. *Lopez* v. *United States, supra,* 373 U.S. at 440. "[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice." *Elkins* v. *United States, supra,* 364 U.S. at 216.

A decision by the court below to suppress the tape recorded conversations under its supervisory powers would have disregarded both of these limitations. As we explained in *Jacobs,* two Acts of Congress—Rule 402 of the Federal Rules of Evidence and 18 U.S.C. 3501—prohibited the court's exercise of any supervisory power it might otherwise have to suppress evidence of respondent's relevant and voluntary self-incriminating statements to Agent Yee.[24]

[23] See also *Gordon* v. *United States,* 344 U.S. 414, 418; *Wolfle* v. *United States,* 291 U.S. 7, 13; *Funk* v. *United States,* 290 U.S. 371, 374-375, 379, 382.

[24] Section 3501 provides that "a confession"—defined to mean "any self-incriminating statement"—"shall be admissible in evidence if it is voluntarily given." There is no question that respondent's offers of money in exchange for Agent Yee's favorable disposition of respondent's audit were both "self-incriminating" and "voluntarily given."

Rule 402, Fed. R. Evid., provides that "[a]ll relevant evidence is admissible" except as otherwise provided by the Constitution, by statute, by the Rules of Evidence themselves, "or by other rules prescribed by the Supreme Court pursuant to statutory authority." In enacting this Rule, Congress withdrew from all federal courts save the Supreme Court any power to fashion special rules of evidentiary exclusion and permitted the Supreme Court to act in this regard only "pursuant to statutory authority" (*i.e.,* through its rule-making function, not in adjudication of cases).

Moreover, even assuming that these two Acts are not controlling here, suppression would be inappropriate because there was no "manifestly improper conduct by federal officials." *Lopez* v. *United States, supra,* 373 U.S. at 440.[25] The IRS agents' decision to monitor respondent's bribe offer was legitimate, the recordings of that conversation complied with all constitutional and statutory requirements, and any deviations from the agency's internal guidelines occurred in good faith. Hence, the Court's admonitions in *Lopez,* also in the context of a motion to suppress recordings of a defendant's face-to-face conversations with an IRS agent whom he had attempted to bribe, are equally applicable here (373 U.S. at 440):

> The function of a criminal trial is to seek out and determine the truth or falsity of the

[25] Indeed, exercise of supervisory authority over law enforcement practices of the Executive Branch would be less justified here than in *Jacobs.* Suppression in that case arguably could have been explained in terms of the court of appeals' "supervision" of conduct occurring before the grand jury, an arm of the court.

> charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.
>
> When we look for the overriding considerations that might require the exclusion of the highly useful evidence involved here, we find nothing. There has been no invasion of constitutionally protected rights, and no violation of federal law or rules of procedure. Indeed, there has not even been any electronic eavesdropping on a private conversation which government agents could not otherwise have overheard. There has, in short, been no act of any kind which could justify the creation of an exclusionary rule.

See also *Funk* v. *United States*, *supra*, 290 U.S. at 381; *United States* v. *Grimes*, 438 F. 2d 391, 395 (C.A. 6), certiorari denied, 402 U.S. 989; *United States* v. *Jones*, 433 F. 2d 1176, 1181-1182 (C.A. D.C.), certiorari denied, 402 U.S. 950; *United States* v. *Quarles*, 387 F. 2d 551, 555-556 (C.A. 4), certiorari denied, 391 U.S. 922.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1978.

APPENDIX

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

Oct. 16, 1972

MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

Re: Monitoring Private Conversations with the Consent of a Party

This memorandum concerns the investigative use of electronic and mechanical devices secretly to overhear, transmit, or record private conversations when one or more of the parties to the conversation is a Federal agent or is cooperating with a Federal agent and has consented to the overhearing, transmitting, or recording of the conversation. This memorandum does not restrict any form of monitoring when all parties to the conversation consent, nor does it affect existing instructions on the related matter of electronic surveillance without the consent of any party to a conversation. (See Manual for Conduct of Electronic Surveillance under Title III of Public Law 90-351; and Outline of Duties and Responsibilities of Attorneys and Agency Personnel Involved in the Conduct of Title III Court Authorized Interceptions, distributed Nov. 3, 1970).

I. The Law On Monitoring Private Conversations with the Consent of a Party.

The Supreme Court of the United States has for some time distinguished between electronic surveillance of a conversation without the consent of any of the participants, which in most circumstances is constitutionally impermissible without court order, and the monitoring of a conversation with the consent of one but not all of the participants. See *On Lee* v. *United States*, 343 U.S. 747 (1952) (informant carrying concealed transmitter); *Lopez* v. *United States*, 373 U.S. 427 (1963) (agent carrying concealed recorder); *Rathbun* v. *United States*, 355 U.S. 107 (1957) (police officer listening on extension telephone). While the decisions in the cases involving consensual monitoring have been predicated on various grounds, it is apparent that the central difference between consensual monitoring and non-consensual electronic surveillance is that in the consensual situations there exists one party to the conversation who is working with the government and who will relate to the government the substance of the conversation, and that in such situations the monitoring serves simply to provide instantaneous communication and to assure effective corroboration. The government in such situations gains access to no information it would not otherwise have obtained; it simply obtains it faster and in a more probative form. This essential difference was recently emphasized by the Supreme Court [in] *United States* v. *White*,

401 U.S.C. [sic] 745 (1971) decided April 5, 1971, in which the Court held that a Federal agent could properly testify to statements he had overheard a defendant make to a government informer by means of a secret transmitting device which the informer had concealed on his person at the time. Announcing the judgment of the Court, Mr. Justice White stated:

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. * * * For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, * * * (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. * * * If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.
>
> * * * [T]he law permits the frustration of actual expectations of privacy by permitting au-

thorities to use testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants * * *. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. [Citations omitted.]

The Court in *White*, after noting that there was no constitutional prohibition against the monitoring of conversations with the consent of one party, called attention to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. That statute, in the subsection enacted as 2511(2) of Title 18 of the United States Code, excepted consensual monitoring from its coverage as follows:

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire [i.e., telephone] or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purposes of committing any other injurious act.

II. Administrative Regulations Concerning Consensual Monitoring Conversations.

The monitoring of conversations with the consent of one of the participants is a particularly effective and reliable investigative technique, and its use by Federal agents in investigating criminal cases is encouraged where appropriate and is expected where necessary. Nevertheless, although it is clear that such monitoring is constitutionally and statutorily permissible—and therefore that it may be conducted without judicial warrant—it is appropriate that this investigative technique continue to be the subject of careful self-regulation by the Executive Branch of the Federal Government. Accordingly, the following restrictions will apply in all criminal investigations employing the consensual monitoring of conversations.

(a) Conversations other than telephone conversations.

All Federal departments and agencies shall, except in exigent circumstances as discussed below, obtain the advance authorization of the Attorney General or any designated Assistant Attorney General [or Deputy Assistant Attorney General]* before using any mechanical or electronic device to overhear, trans-

* The phrase in brackets was added by an amendment issued by Attorney General Richardson on September 4, 1973.

mit, or record private conversations other than telephone conversations without the consent of all the participants. Such authorization is required before employing any such device, whether it is carried by the cooperating participant or whether it is installed on premises under the control of the participant.

Requests for authorization to monitor private conversations shall be addressed to the Attorney General, in writing, by the head of the department or agency responsible for the investigation, or his delegate, and shall state:

1. The reason why monitoring appears desirable, the means by which it would be conducted, the place in which it would be conducted, and its expected duration.
2. The names of the persons whose conversations would be monitored and their roles in the matter under investigation. When the name of the non-consenting party or parties is not known at the time the request for authorization is made, the department or agency making the request shall supply such information to the Attorney General within 30 days after the termination of the monitoring.
3. That it is the considered judgment of the person making the request that monitoring is warranted in the interest of effective law enforcement.

Requests for authorization will receive prompt consideration by the Attorney General or his designee.

To assure adequate time for considering a request and for notifying the requesting department or agency of the appropriate decision, it is important that each request be received by the Office of the Attorney General no less than 48 hours prior to the time of the intended monitoring. It should be clearly understood that the use of consensual devices will not be authorized retrospectively.

Where a request cannot be made in compliance with the 48-hour requirement, or in exigent circumstances precluding request for authorization in advance of the monitoring—such as the imminent loss of essential evidence or a threat to the immediate safety of an agent or informant—emergency monitoring may be instituted under the authorization of the head of the responsible department or agency or other agency official or officials designated by him. The Attorney General or his designee shall be notified promptly of any such monitoring and of the specific conditions that precluded obtaining advance approval, and shall be afforded the information enumerated above that would have been given in requesting advance approval. Each department and agency should develop procedures to assure that under such exigent circumstances its agents will be capable of acting expeditiously. The Attorney General or his designee shall be kept advised as to the identity of those officials who have been designated by department or agency heads to authorize such emergency monitoring.

(b) Telephone conversations.

Telephone conversations—because they involve the transmission of the participants' conversations through a complex and far-flung network of wires, the common use of multi-party lines and extension telephones, and the possibility of an unseen participant permitting another person to listen at the same telephone—have long been considered not to justify the same assumption of privacy as a face-to-face conversation. Nevertheless, there is still a need to provide for the supervision and control of consensual monitoring of telephone conversations. Accordingly, the current practice of charging each department and agency with the control of such consensual monitoring by its agents will continue. Each department and agency head shall assure the adoption or the continuation of agency rules on this subject. Such rules shall also provide for the expeditious, oral authorization of such monitoring where necessitated by exigent circumstances.

III. Security of monitoring devices.

It shall be the responsibility of the head of each investigating agency to procure and maintain only the minimum number of devices designed for the consensual monitoring of conversations that the agency reasonably needs, consistent with current policy, to overhear, transmit, or record private conversations for investigative purposes. The equipment shall be stored, as feasible, in one central location or in a

limited number of locations so as to facilitate administrative control.

An inventory shall be maintained on a current basis at each location at which monitoring equipment is stored. All equipment must be accounted for at all times. When equipment is withdrawn from storage a record shall be made as to the times of withdrawal and of its return to storage. By written report, the agent to whom the equipment is assigned shall account fully for the time he possessed the monitoring equipment and the uses he made of it. Equipment should be returned to storage when not in actual use except to the extent that returning the equipment would interfere with its proper utilization.

Each agency shall maintain copies of the complete inventories of equipment showing the times of withdrawals and returns, and copies of the written reports of the responsible agents specifying the uses made of the equipment. Such records should be retained for at least six years.

IV. Annual Reports.

The head of each investigative agency, or his delegate, shall submit to the Attorney General during July of each year a report containing (1) an inventory of all the agency's electronic and mechanical equipment designed for the monitoring of conversations, and (2) a brief statement of the results obtained during the prior fiscal year by the use of such investigative monitoring.

This Memorandum supersedes the Memorandum to the Heads of Executive Departments and Agencies, dated June 16, 1967, captioned "Wiretapping and Electronic Eavesdropping."

/s/ Richard G. Kleindienst
Attorney General

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